AUG 17 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950

No. 253

ARGONNE COMPANY, INC., A Corporation, *Petitioner*

vs.

LUCIA HITAFFER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

H. MASON WELCH
J. HARRY WELCH
JOHN R. DAILY
J. JOSEPH BARSE
Continental Building
Washington, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
1139 Shoreham Building
Washington, D. C.
Of Counsel

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

CONTENTS

	PAGE
Introduction	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Facts	3
Specifications of Errors	4
Reasons for Granting the Writ	5
Argument and Brief	7
1. The United States Court of Appeals for the District of Columbia Circuit, in Its Holding That the Longshoremen's and Harbor Workers' Compensation Act Did Not Provide an Exclusive Remedy for an Action of This Type, Erred in Its Interpretation of the Act Itself and in Its Interpretation of the Decisions of the Other United States Courts of Appeals on the Same Subject	7
2. The United States Court of Appeals for the District of Columbia Circuit in Its Decision in This Cause Has Not Given Proper Effect to Applicable Decisions of This Honorable Court	13
3. The Proper Interpretation of Section 905 of the Longshoremen's and Harbor Workers' Compensation Act is of General Importance and a Question of Substance Relating to the Application of Said Act Which Should be Settled by This Honorable Court	14
Conclusion	24

Cases

American Mutual Liability Insurance Company v. Matthews et al., 182 Fed. 2d 322	6-10
Bethlehem Ship-Building Corp. v. Monahan, 54 Fed. 2d 349	22

PAGE

Braner v. Brooklyn Eastern District Terminal, 46 Fed. Supp. 302 12
Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873 22
Case v. Pillsbury, 52 Fed. Supp. 882 22
Deluhery v. Sisters of St. Mary, 244 Wis. 254, 12 N. W. (2d) 49 17
Hamilton v. Russell, 1 Cranch 309, 2 L. Ed. 118 22
Hanson v. Morton, (Sup. Ct. of Mo. 1937) 103 S. W. 2d 1 17
Henrietta v. Min. & Mill Co. v. Gardner, 173 U. S. 123, 19 S. Ct. 327, 43 L. Ed. 637 22
Holder v. Elms Hotel Co., 338 Mo. 357, 92 S. W. 2d 620.. 17
Larson v. Todd Ship Yards Corporation, 16 Fed. Supp. 967 19
Luckenbach S. S. Co. v. Marshall, 49 Fed. (2d) 625 22
Lynch v. United States, 163 Fed. (2d) 97 5-12
Marshall v. Andrew Mahony Co., 56 Fed. (2d) 74 22
Massman Construction Co. v. Bassett, 30 F. Supp. 813.. 19
Mellen v. H. B. Hirsch & Sons, 82 U. S. App. D. C. 1, 159 Fed. (2d) 461 19
Metropolitan R. Co. v. Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022 22
Moore v. Christensen, S. S. Co., 53 Fed. (2d) 299 19
McVey v. C. & P. Telephone Co., 103 W. Va. 519; 138 S. E. 97 17
Nogueria v. N. Y., N. H., & H. R. Co., 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754 7-14-19
Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931 7-14
Rhinehart v. T. Smith & Son, 14 So. 2d 287 18
Rich v. U. S., 177 Fed. (2d) 688 8
Sharp v. Producer's Produce Co., 226 Mo. App. 189, 47 S. W. 2d 242 17
Swan v. F. W. Woolworth & Co., 129 Misc. 600, 222 N. Y. Supp. 111 16-21
Swanson v. Marra, 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 6-14
The Tampico, 45 Fed. Supp. 174 8
Ulrich v. Terminal Operating Corp., 271 App. Div. 930, 67 N. Y. S. 2d 590 17
United States v. Arrow Stevedoring Company, 175 Fed. (2d) 329 6-11

PAGE

Wald v. B. & O. Railroad Co., 71 Fed. (2d) 810 19
Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175; 15 N. E. 2d 567 10
Willis v. Eastern Trust & Bkg. Co., 169 U. S. 295, 18 S. Ct. 347, 42 L. Ed. 752 21

Statutes

House Report 1422, 70th Cong. 1st Session 20-21
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Chapt. 18, Title 36-501 D. C. Code, 1940 Edition, Sec. 905 2-3-5
Massachusetts Statute of 1860 21
The Workmen's Compensation Law of the State of Missouri, Section 3301 R. S. Mo. 1929 16
U. S. Code Annotated, Title 28 paragraph (1) 2
West Virginia Compensation Act 17
Wisconsin Compensation Act 17
Workmen's Compensation Act of the State of N. Y., N. Y. Consol. Laws, C 67 15

IN THE

Supreme Court of the United States

October Term, 1950

No. .....

ARGONNE COMPANY, INC., A Corporation, *Petitioner*

vs.

LUCIA HITAFFER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petitioner, Appellee below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 29, 1950. (R. 25).

OPINIONS BELOW

The United States District Court for the District of Columbia did not render an opinion in this cause. The opinion of the United States Court of Appeals for the

District of Columbia Circuit is set forth on pages 13 through 24 of the record. It has not as yet been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 29, 1950. (R. 25). The jurisdiction of this Court is invoked under Title 28, paragraph 1254 (1) U. S. Code Annotated.

QUESTIONS PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Chapter 18, as made applicable to the District of Columbia, Title 36-501, D. C. Code, 1940 Edition, Section 905 of which Act states:

> "Exclusiveness of Liability. The liability of an employer prescribed in Section 904 of this Chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death result from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. * * *"

provides an exclusive liability for employers as specifically stated therein or whether when an employee has been injured in the course of his employment and has received compensation therefor under the provisions of said Act, the employee's wife is entitled to sue the employer for alleged loss of consortium.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424; 33 U. S. C. A. paragraphs 901 et seq., as made applicable to the District of Columbia by Act of May 17, 1928, 45 Stat. 600, title 36-501, D. C. Code, 1940.

STATEMENT OF FACTS

There was filed on December 11, 1948 in the United States District Court for the District of Columbia a complaint for damages for personal injuries, the same being Civil Action No. 5011-48 under the title, "Pierce Henry Hitaffer and Lucia Hitaffer vs. Argonne Company, Inc." Complaint was in two counts, first count alleging that plaintiff was an employee of the defendant and that in the course of his employment on December 18, 1945 defendant's negligence caused him to be injured. The second count alleged that plaintiff Pierce Henry Hitaffer and plaintiff Lucia Hitaffer were husband and wife, having been married in April 1922; that they had lived happily together as such and that their normal marital relationship was interrupted by the injuries received as a result of the negligence of the defendant; and plaintiff Lucia Hitaffer claimed damages for being deprived of the comfort, aid, assistance and enjoyment of her husband. (R. 2, 3 and 4).

Motion for summary judgment was filed by defendant Argonne Company, Inc. (R. 5) supported by affidavit, said motion and affidavit being filed February 17, 1949 (R. 5, 6). Said affidavit stated that the defendant corporation had in effect at the time of the alleged injury a Workmen's Compensation policy of insurance providing benefits to any of the employees of the corporation who might be injured in the course of their employment; the injury to the plaintiff Pierce Henry Hitaffer was admitted and stated to have occurred on December 22, 1945 in the

course of his employment. The affidavit further set forth that the employee was furnished with medical attention and paid compensation in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

On February 23, 1949, opposition to defendant's motion for summary judgment was filed by the plaintiffs, with supporting points and authorities (R. 7, 8 and 9).

On February 24, 1949, the motion having been heard and argued, there was filed an order in the United States District Court for the District of Columbia dismissing the cause and entering judgment with costs against the plaintiff.

Notice of appeal was filed by Lucia Hitaffer, only, March 16, 1949 (R. 10), to the United States Court of Appeals for the District of Columbia; designation of record was filed March 24, 1949 (R. 10), and counter-designation of record filed April 4, 1949 (R. 11).

The United States Court of Appeals by its judgment dated May 29, 1950 reversed the action of the lower court and remanded the matter for further proceedings (R. 25).

Petitioner applies for Writ of Certiorari from that judgment of the United States Court of Appeals for the District of Columbia Circuit.

SPECIFICATION OF ERRORS

(1). That the United States Court of Appeals for the District of Columbia Circuit erred in its ruling that Section 905 of the Longshoremen's and Harbor Workers' Compensation Act does not provide an exclusive liability to the employer which precludes a wife from bringing a common law action against her husband's employer for alleged loss of consortium as a result of injuries received by the husband in the course of his employment where

compensation in accordance with the said Act has been secured.

(2). In holding that *no* "independent" right or claim of a third person is barred by the "exclusiveness of liability" provisions of the Longshoremen's and Harbor Workers' Compensation Act, or, conversely, in holding that Section 905 of the Longshoremen's and Harbor Workers' Compensation Act is designed to make the employer's liability under this statute exclusive only as to claims by the injured employee or anyone suing *in his right.*"

REASONS FOR GRANTING THE WRIT

The Petitioner asserts that a Writ of Certiorari should be granted in this cause under subdivision Five (5) of Rule 38 of this Honorable Court, for the following reasons:

(1). The United States Court of Appeals for the District of Columbia Circuit has rendered a decision in conflict with a decision of the United States Court of Appeals for the Second Circuit on the same underlying question; that is to say, the United States Court of Appeals for the Second Circuit in the case of *Lynch* vs. *United States*, 163 Fed. 2d. 97, decided July 3, 1947, held that the widow of a deceased employee had no right of action against her former husband's employer for wrongful death of her husband based upon the alleged negligence of the employer, but that her only remedy was under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, while the United States Court of Appeals for the District of Columbia Circuit decided in this cause that a wife does have a right of action against her husband's employer for loss of consortium based upon the alleged negligence of the employer causing the husband-employee's injury, regardless of the clear and unmistakable language of Section 905 of the Act.

The decision in this cause is also in conflict with another decision of the United States Court of Appeals for the Second Circuit on much the same question: The United States Court of Appeals for the District of Columbia Circuit held in its opinion that a third party may sue an employer notwithstanding Section 905 of the Longshoremen's and Harbor Workers' Compensation Act for the breach of any independent duty owed him by the employer, while the United States Court of Appeals for the Second Circuit in *American Mutual Liability Insurance Company* vs. *Matthews, et al,* 182 F (2d) 322 (decided May 16, 1950), held that a third party may sue the employer only in the limited situation where there has been a breach of a *contractual* duty owed to the third party by the employer, and that to impose liability to a third party upon the employer for breach of a non-contractual duty is "pro tanto" to deprive him of the immunity which Section 905 of the Longshoremen's and Harbor Workers' Compensation Act grants him in exchange for his absolute though limited liability to secure compensation to his employees.

The decision herein conflicts also with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *United States* vs. *Arrow Stevedoring Company (June 21, 1949) 175 F (2d) 329,* in which that Court held that where those entitled to damages because of the injury to or death of an employee had no contract relationship to the employer other than the employment itself, they were limited to the remedies under the Longshoremen's and Harbor Workers' Compensation Act.

(2). The decision of the United States Court of Appeals for the District of Columbia Circuit in this cause is in conflict with the decisions of this Honorable Court which hold that the prescribed liability of an employer under the Longshoremen's and Harbor Workers' Compensation Act is exclusive, namely: *Swanson* vs. *Marra,*

328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); *Nogueira* vs. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754 (1930); *Norton* vs. *Warner Co.*, 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931 (1944).

(3). The Longshoremen's and Harbor Workers' Compensation Act is one of the most important pieces of legislation ever enacted by the Congress and is applied in every jurisdiction in the country. The proper interpretation of its provisions is a matter of great importance and national concern. This Honorable Court, therefore, should grant the Writ in this cause so that the question of the precise meaning of Section 905 of the Act may be definitely settled and not left in a state of confusion by the conflicts between on the one hand the plain language of Section 905 and the many cases interpreting this section literally, and on the other the decision of the United States Court of Appeals for the District of Columbia Circuit in this cause interpreting the Section contrary to all other decided cases on the subject and the language of the Section itself.

ARGUMENT AND BRIEF

I. The United States Court of Appeals for the District of Columbia Circuit, in Its Holding That the Longshoremen's and Harbor Workers' Compensation Act Did Not Provide an Exclusive Remedy for an Action of This Type, Erred in Its Interpretation of the Act Itself and in Its Interpretation of the Decisions of Other United States Courts of Appeals on the Same Subject.

The United States Court of Appeals for the District of Columbia Circuit in its decision in this cause made the following statement:

> "But where a third person is suing in his or her own right on account of the breach (of) some independent duty owed them by the employer, even

though the operative facts out of which this independent right and co-relative duty arose are the same out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action." (R. 10, 11)

In support of this Rule, two cases were cited:

The Tampico (D. C. N. Y. 1942), 45 Fed. Supp. 174
Rich vs. *U. S.* (C. C. A. 2, 1949), 177 Fed. 2d 688 (R. 22-23)

It should be pointed out that these cases are entirely different types of cases from the instant one, and from the facts therein should have no application whatsoever in resolving the issue in this cause. In both of them the action was brought by the employee against a third party in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, alleging negligence on the part of the third party which caused injury to the employee. The third party then impleaded the employer praying for indemnity or contribution, and the employer raised against the third party the defense of Section 905 of the Act.

In this cause those sections of the Act allowing the employee to file suit against a third party are not involved in any way. The action here has been brought by the employee's wife directly against the employer.

Section 905 of the Act, in enumerating the classes of persons with respect to which the employer's liability under the Act shall be exclusive, specifically includes a "wife." *Not* included therein is a "third party" such as brought the impleading actions against the employer in the *Rich* and *Tampico* cases. Where a statute specifically enumerates a class of persons to whom it shall be applied, generally speaking the Act will be strictly construed and not applied to a person or party not enumerated therein. This rule alone justifies the decisions not allowing the employer's defense of Section 905 in *Rich* vs. *United States* and *The Tampico*.

In the present case, however, since a "wife" is specifically enumerated in the Section, it will be construed strictly and literally, and the liability of the employer as prescribed by the Act must be exclusive.

Therefore, for these two reasons, viz.: the rule of proper construction of statutes and the factual difference between the instant case and the *Rich* and *Tampico* cases, they should not be relied upon as authoritative for the decision of the issue herein.

However, even if it could be maintained that those two cases may be relied upon, it is respectfully submitted that the decision in this case misinterpreted and misapplied the rules laid down in the *Rich* and *Tampico* cases.

The Tampico limited itself to the question of contribution between joint tort feasors based upon an admiralty right. There is no question of contribution in the instant cause.

Rich vs. *United States* was a case where the Pyrate Tank Cleaners, Inc. was the employer and Rich was the employee. Pyrate had been engaged by the United States to clean the tanks of a vessel owned by the Government. Rich, while in the employ of Pyrate and while working in cleaning the tanks, was injured. He received payments under the Act from his employer for 28 weeks. He then filed suit against the Government as a third party as allowed by the Longshoremen's and Harbor Workers' Act, and the Government sought to implead Pyrate, seeking indemnity from the corporation. In allowing the employer to be brought in, the Court said, *supra* p. 691:

> "If it should turn out that the libellant's injuries were primarily caused by the negligence of his employer in fastening the ladder insecurely for his use, the United States would have a cause of action against the employer based upon the latter's *independent duty to indemnify* it for any loss sustained by the libellant's election to sue it for injuries. It was so held in West-

chester Lighting Co. vs. Westchester County Small Estates Corp., 278 N. Y. 175; 15 N. E. 2d 567, where it was decided that the New York Workmen's Compensation Act containing almost precisely the same language as that now relied upon in the Longshoremen's and Harbor Workers' Act did not bar a suit for *indemnity*. It was there said that the third party does not sue the employer for damages 'on account of' the injury to or death of the employee, but for breach of an independent duty owing to the third party by the employer. * * *

"Since the United States, if held liable in this suit, could sue the libellant's employer *for indemnity* despite the provisions of the Longshoremen's and Harbor Workers' Compensation Act, we can perceive no sound reason why it should not be allowed to accomplish the same result by way of impleading the employer in this action." (Emphasis added).

From the above excerpt in the opinion in the *Rich* case, it clearly appears that the Government's right of action against the employer was based solely upon an independent contractual duty to indemnify the Government should the Government suffer any injury as a result of the employer's negligence in performing the task which he had contracted to perform.

The same court in the case of *American Mutual Liability Insurance Co.* vs. *Matthews, et al, supra,* decided May 16, 1950, recognized that the Rich case allowed the action by the third party against the employer only where the injury to the employee was a breach of a contractual duty owed to the third party to do the work properly. After stating the basis for allowing recovery against the employer by the third party in the Rich case, the decision in Matthews case stated (p. 324):

"In the absence of an express promise (to use care), such an implication would be utterly unreasonable. Hence, we can find no contractual basis for indemnity or contribution. To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the Statute grants

him in exchange for his absolute, though limited, liability to secure compensation to his employee."

In *United States* vs. *Arrow Stevedoring Company* (C. A. 9th, June 21, 1949), 175 F. (2d) 329, one Williams brought a proceeding against the United States. Williams was an employee of the Arrow Stevedoring Company. The Government admitted liability to Williams and in their suit impleaded Arrow on the basis of an indemnity contract between Arrow and the United States. Arrow raised the defense of Section 905 of the Longshoremen's and Harbor Workers' Compensation Act, and to this defense the Court stated (p. 332):

"We do not agree. Here Arrow has contracted to be liable to the Government for the latter's liability arising (here solely), from the former's negligence. We do not think that the phrase, 'and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death' takes from the employer the right to *contract* for such a liability, assuming that in the absence of such a contract the Government is 'anyone otherwise entitled', etc. We construe the Act as limited to liability of the employer to those entitled to damages upon the injury to or death of the employee, without any contract relationship to the employer other than the employment."

These cases, therefore, establish clearly that the employer is liable for contribution or indemnity to a third party notwithstanding Section 905 of the Act only in the limited situation where there has been a breach by the employer of an independent contractual duty owed to the third party. The cases do not go so far as to hold, as the United States Court of Appeals for the District of Columbia Circuit did in this cause, that where there was merely an alleged breach of some independent duty, not contractual, that a third party had a right of action against the employer. In fact, the *Matthews* and the *Arrow Stevedoring* cases expressly hold that unless there is such a contractual duty, the employer's liability is

limited to that provided for by the Longshoremen's and Harbor Workers' Compensation Act.

The case of *Lynch* vs. *Untied States* (C. A. 2d, 1947) 163 F. (2d) 97, was a libel for wrongful death brought against the United States by a widow whose deceased husband had been employed by Bethlehem Steel Company. Bethlehem had a contract to repair a vessel owned by the United States, and in the course of such repair work libellant's husband was killed. The United States impleaded Bethlehem Steel Company as a party respondent. After trial, both the libel and the impleading petition were dismissed. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and held:

(1). That the United States could not be held liable as the vessel was in the entire control of Bethlehem at the time of the injury, and in such a case, the Government was not under a duty to provide a safe place to work after the time that Bethlehem assumed control of the ship; and (2). That Bethlehem Steel Company was not liable. With respect to this point, the Court stated (p. 98):

> "The Libellant cannot recover from Bethlehem in this suit; her only remedy against it lies under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901."

The case of *Braner* vs. *Brooklyn Eastern District Terminal* (E. D. N. Y. 1942), 46 F. Supp. 302, was an action under the Jones Act by a widow against her former husband's employer for the death of her husband. Defendant filed affidavits showing that the employment was of the type covered by the Longshoremen's and Harbor Workers' Compensation Act and on the basis of such affidavits filed a motion for summary judgment. This motion was granted by the District Court and judgment entered for the employer. The court held that where the Longshoremen's and Harbor Workers' Compensation Act applies, the remedy in compensation is exclusive and that where

it appears that the employer has provided compensation, summary judgment for the employer will be granted.

The United States Court of Appeals for the District of Columbia Circuit, therefore, had before it two decisions, one by the United States Court of Appeals for the Second Circuit and one by the District Court for the Eastern District of New York, in both of which cases the employee's widow sought relief against her former husband's employer for the death of her husband by remedies outside of those provided in the Longshoremen's and Harbor Workers' Compensation Act. In both of the cases, it was decided that the widow had no remedy outside of the Act and that, therefore, the suits had to be dismissed. The decision in this cause by the United States Court of Appeals for the District of Columbia Circuit does not refer to either of these two decisions. If they were considered, it must be implied that the Court felt that an employer owed a duty to a wife for injuries to her husband, for the breach of which the employer would be liable at law, though it did not owe such a duty to a widow for the death of a husband. Can it be maintained that an employer owes two entirely different duties to a wife, dependent upon whether the employee was merely injured or was killed, and that in one instance the Longshoremen's and Harbor Workers' Compensation Act provides an exclusive remedy to the widow, but that in the other, it does not provide an exclusive remedy to the wife?

Petitioner feels that to state the question is to answer it.

II. The United States Court of Appeals for the District of Columbia Circuit in Its Decision in This Cause Has Not Given Proper Effect to Applicable Decisions of This Honorable Court.

While the decisions of this Honorable Court have never decided the precise issue involved in this cause, nevertheless, they have decided that the remedy pro-

vided under the Longshoremen's and Harbor Workers' Compensation Act is exclusive as against the employer of the deceased. "In *Swanson* vs. *Marra,* 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946), this Court said (328 U. S. 6), in holding that a suit under the Jones Act was barred by the Longshoremen's and Harbor Workers' Compensation Act: "The liability of employers to pay the prescribed compensation, is, by § 905, made 'exclusive and in place of all other liability of such employer to the employee', his legal representative and any other person entitled to recover damages 'at law or in admiralty' from the employer for the injury or death." To the same effect, using similar language in holding that § 905 precludes a suit under the Federal Employers' Liability Act, is *Nogueira* vs. *New York, N. H. & H. R. Co.,* 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754 (1930). And see *Norton* vs. *Warner Co.,* 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931 (1944), where this Court stated (321 U. S. at p. 570) that "The liability of an employer under the Act is exclusive, § 5, 33 USCA § 905, 10 FCA title 33, § 905."

III. The Proper Interpretation of Section 905 of the Longshoremen's and Harbor Workers' Compensation Act is of General Importance and a Question of Substance Relating to the Application of Said Act Which Should be Settled by This Honorable Court.

The remedies to employees established by the Longshoremen's and Harbor Workers' Compensation Act have been invoked to the benefit of employees in thousands of instances since the passage of the Act. The provisions of the Act will in the future be invoked in many thousands more instances by employees to recover compensation for injuries sustained by them during the course of their employment. The provisions of the Act have been interpreted time and again by numberless courts throughout the country. Whenever any legislative action of the Con-

gress is applied in so many instances throughout the nation, it is of the utmost importance that the provisions thereof be interpreted clearly and uniformly by the courts and that they have sound judicial precedent to follow in rendering interpretive decisions.

Throughout the nation, Section 905 of the Longshoremen's and Harbor Workers' Compensation Act has been interpreted to mean literally what it says, that is, that the liability of an employer prescribed by the Act is exclusive and in place of all other liability of said employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of injury or death of the employee. No case has yet been found by petitioner other than the one at issue which decides that any of the persons or classes of persons named in Section 905 have any remedy against the employer except the remedy provided by the Act. Because of the importance of the Act and of the proper interpretation of Section 905, and because the decision by the United States Court of Appeals for the District of Columbia Circuit in this cause is unique and stands opposed to an unanimity of decisions of courts in many other jurisdictions, petitioner respectfully submits that a Writ of Certiorari should be granted in this cause, so that this Honorable Court may decide the question of the proper interpretation of Section 905.

Admittedly the Longshoremen's and Harbor Workers' Compensation Act was based upon the Workmen's Compensation Act of the State of New York and, therefore, decisions of New York Courts interpreting the provisions of that State's Acts are persuasive authority to rely upon for the interpretation of the Federal Act. The Workmen's Compensation Act of the State of New York provides that the liability of an employer "shall be exclusive and in place of any other liability whatsoever, to such em-

ployee, his personal representatives, husband, parent, dependents or next of kin, or anyone else otherwise entitled to recover damages, at common law or otherwise on account of such injury or death". In the case of *Swan* vs. *F. W. Woolworth & Co.* (1927) 129 Misc. 600, 222 N. Y. Supp. 111, this provision was held to be plain and unambiguous, and to precude a husband from recovering for the loss of his wife's services when she was injured in the course of her employment and became entitled to compensation.

The Workmen's Compensation Law of the State of Missouri is very similar to the Longshoremen's and Harbor Workers' Compensation Act and Section 3301 R. S. Mo. 1929 provides:

> "If both employer and employee have elected to accept the provisions of this chapter the employer shall be liable irrespective of negligence to furnish compensation under the provisions of this chapter for personal injuries or death of the employee by accident, arising out of and in the course of his employment and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his wife, her husband, parents, personal representatives, dependents, heirs or next of kin at common law or otherwise on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter."

This provision of the Missouri Compensation Act has been interpreted as destroying the right of the husband to maintain a common law action for loss of services of his wife, the Act coming within the purview of that class of cases holding that where a statute abrogates a common law right by express provisions, the right may no longer be enforced.

Sharp vs. *Producer's Produce Co.*, 226 Mo. App. 189, 47 S. W. 2d 242.

Holder vs. *Elms Hotel Co.*, 338 Mo. 357; 92 S. W. 2d 620

Hanson vs. *Morton* (Sup. Ct. of Mo. 1937), 103 S. W. 2d 1.

The Supreme Court of Appeals for West Virginia, in interpreting the West Virginia Compensation Act, which is similar to the Longshoremen's and Harbor Workers' Compensation Act, held in *McVey* vs. *C. & P. Telephone Co.*, 103 W. Va. 519, 138 S. E. 97, that the West Virginia Act precluded a common law action by a husband against his wife's employer for loss of consortium arising out of injuries sustained by the wife in the course of her employment.

In another New York case, *Ulrich* vs. *Terminal Operating Corp.*, 271 App. Div. 930, 67 N. Y. S. (2d) 590, and in *Deluhery* vs. *Sisters of St. Mary*, 244 Wis. 254, 12 N. W. 2d 49 (the Wisconsin Compensation Act also being similar to the Longshoremen's and Harbor Workers' Compensation Act), it was decided that a parent had no right of action against the employer of a minor child or ward, for injuries sustained by the minor in the course of his employment and the resultant expense and loss of services to the parent or custodian, because the respective compensation acts of those states provided an exclusive remedy and abrogated any other liability of the employer.

Petitioner respectfully submits that in all of the above cases, the issue involved is basically the same with the issue presented to the Court of Appeals for the District of Columbia Circuit in the instant case. There has been a uniformity of decision by the State Courts throughout the country, under compensation acts similar to the Longshoremen's and Harbor Workers' Compensation Act, holding that such common law action as a husband (or wife) or parent may have had prior to the passage of the compensation act was abrogated by the act and that

the employer is liable only to the extent of the remedies provided by the respective acts. Since the matter has arisen frequently in the past and since it has been decided unanimously contrary to the decision in this cause, it is respectfully submitted that if the decision herein by the United States Court of Appeals for the District of Columbia Circuit is allowed to stand without interpretation by this Honorable Court, a state of confusion will result not only in the interpretation of the Federal Act but also in the interpretation of the varoius state acts based upon or almost identical to the Federal Compensation Act.

The Longshoremen's and Harbor Workers' Compensation Act has also been applied many times by state courts. One of these decisions, which is very closely in point to the instant case, is *Rhinehart* vs. *T. Smith & Son* (La. 1932), 14 So. 2d 287. This was an action for wrongful death against the decedent's employer brought by the brother and sister of the decedent. The defendant employer filed a motion to dismiss the complaint on the ground that Section 905 of the Longshoremen's and Harbor Workers' Compensation Act provided an exclusive remedy. In affirming the trial court's judgment of dismissal, based on defendant's motion, the Court of Appeals of Louisiana stated:

> "There can be no doubt whatever as to the plain import of the above quoted language (Section 905) * * *.
>
> "* * * the Longshoremen's and Harbor Workers' Compensation Act limits the liability of the employer in cases of this kind to that provided by the law and abrogates the claims of any person entitled to recover damages against such employer at law or in admiralty on account of the injury or death of the employee."

A few of the many Federal decisions interpreting Section 905 of thet Act are the following:

Larson vs. *Todd Ship Yards Corporation,* (E. D. N. Y. 1936), 16 F. Supp. 967:

"The exclusiveness of the remedy (afforded by 33 U. S. C. A. paragraph 901 et seq.) cannot be evaded save in a case where an employer fails to secure payment of compensation as provided in the Act."

Massman Construction Co. vs. *Bassett* (E. D. Mo. 1940), 30 F. Supp. 813:

"The Longshoremen's and Harbor Workers' Compensation Act was designed to provide for maritime workers a remedy similar to that provided by State compensation laws. *Crowell* vs. *Benson,* supra; *De Wald* vs. *B. & O. Railroad Co.,* 4 Cir. 71 Fed. 2d 810. The remedy provided by the Act is exclusive of any other recourse. *Noguerira* vs. *N. Y. & N. H. R. Co.,* 281 U. S. 128, 50 Sup. Ct. 303, 74 L. Ed. 754; *Moore* vs. *Christensen, S. S. Co.,* 5 Cir. 53 Fed. 2d 299."

Mellen vs. *H. B. Hirsch & Sons,* 82 U. S. App. D. C. 1, 159 Fed. 2d 461 (1947):

"* * * There is no reason to suppose that Congress did not mean what it plainly said."

The above state and federal decisions are but a few of the many interpreting Section 905 of the Longshoremen's and Harbor Workers' Compensation Act and similar state compensation acts, but these few decisions demonstrate the importance of having this section properly interpreted. If the decisions holding that the Compensation Act abrogates common law rights of action are in error, this Honorable Court should so state; similarly if the decision of the United States Court of Appeals for the District of Columbia Circuit in this cause holding that a common law right of action existed and was not abrogated, this Honorable Court should so state, otherwise we will have two entirely different and inconsistent interpretations of the Act.

Petitioner respectfully submits that the decision in this cause interpreting Section 905 is not only contrary to decisions of other Courts of Appeal and of high state courts on the same question, and decisions of this Honor-

able Court generally on the question of the exclusiveness of the prescribed liability, but that it also reads into Section 905 a meaning clearly not intended by the legislature. The United States Court of Appeals for the District of Columbia Circuit in its decision states:

> "There can be no doubt but that this section is designed to make the employers' liability under this statute exclusive of any other liability either at law or in admiralty to the injured employee or anyone *suing in the employee's right.*" (R. 22, (emphasis added.))

It is submitted that Section 905 is not so restricted. It does not state nor imply that the employer may only invoke the limited liability under the Act when claim is being made by the employee or "someone standing in the employee's shoes". What the Act does say is that the employer's liability shall be exclusive and in place of all other liability of such employer to the employee himself, his legal representative, *husband or wife,* parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty *on account of such injury or death.* Congress could not have meant that the employer's liability under the statute is exclusive only when the employee or someone in the employee's right is making a claim. The class of persons enumerated in the statute goes clearly beyond this limited interpretation. A husband or wife could have no claim resulting from injuries to his or her spouse other than a claim for loss of consortium. Such a claim is not one brought in the spouse's right. The Congress must have recognized this at the time the Act was passed and must have had this precise question in mind when they included husbands and wives within the provisions of paragraph 905.

Admittedly, the Longshoremen's and Harbor Workers' Compensation Act is patterned after the Workmen's Compensation Act of the State of New York (see H. Rept.

1422, 70th Cong., 1st Sess.) and the language of Section 905 of the former is almost identical with the parallel section of the latter. The Federal Act was enacted March 4, 1927 and made applicable to the District of Columbia on May 17, 1928. However, *on May 9, 1927* the section of the New York Act corresponding to Section 905 of the District of Columbia Act was interpreted by a New York Court in *Swan* vs. *F. W. Woolworth Co.*, supra, as *precluding a husband from recovering for the loss of his wife's services when she was injured in the course of her employment and became entitled to compensation*, the State having found it to be for the best interests of married women to enact that, when a wife is compensated pursuant to the Workmen's Compensation Law, such compensation shall be in satisfaction of all liability for the injuries received by her, including any damage which the husband might otherwise be entitled to recover. Since the New York Act had been interpreted by the courts of that State prior to the passage of the Act for the District of Columbia, it must be presumed that Congress intended, in enacting Section 905, that this section be construed exactly as had been the New York Act.

> "The resemblance between the provisions of the Massachusetts Statute of 1860 and of the act of Congress of 1864 is so remarkable that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded."

Willis vs. *Eastern Trust & Bkg. Co.*, 169 U. S. 295, 18 S. Ct. 347, 42 L. Ed. 752 (1898).

> "By a familiar canon of interpretation, heretofore applied by this court whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before

> their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state."

Capital Traction Co. vs. *Hof*, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873 (1899).

Supporting the same rule are the following:

Hamilton vs. *Russell*, 1 Cranch 309, 2 L. Ed. 118 (1790);
Henrietta Min. & Mill. Co. vs. *Gardner*, 173 U. S. 123, 19 S. Ct. 327, 43 L. Ed. 637 (1899);
Metropolitan R. Co. vs. *Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022 (1887).

Other federal courts have recognized this rule and have applied it to the very Act here in question. In *Bethlehem Ship-Building Corp.* v. *Monahan*, 54 F. (2d) 349 (C. C. A. 1st 1931), the court said:

> "It appears that the provisions of the Act [Longshoremen's and Harbor Workers' Act] here in question (as well as the Act itself) were taken verbatim from an act placed by the legislature of New York (N. Y. Consol. Laws, c. 67), which had well-settled construction before their adoption by Congress . . . such being the settled construction of these provisions of the N. Y. Act at the time of its action in 1927, it is to be presumed that Congress intended that such provisions should be understood and applied in accordance with that construction. In other words, that it accompanied the Act with the construction placed upon it by the New York Courts."

To the same effect are *Marshall* vs. *Andrew Mahony Co.*, 56 F. (2d) 74 (C. C. A. 9th 1932) (". . . in so adopting the act the Congress intended to adopt the construction theretofore placed upon it by the courts of the state of its enactment") *Case* vs. *Pillsbury*, 52 F. Supp. 882 (N. D. Cal. 1943), aff'd., 148 F. (2d) 392 (C. C. A. 9th 1945); *Luckenbach S. S. Co.* vs. *Marshall*, 49 F. (2d) 625 (D. Ore. 1931)."

Therefore, in view of this well established rule of construction of statutes adopted from other jurisdictions, and the construction given the New York Act in that State, there is no reason to doubt that Congress' express intention in enacting Section 905 was to include a wife within the restrictive provisions thereof and to preclude her from bringing actions such as the present one.

The plain meaning of the language of Section 905 could be nothing other than what it states in so many words, that is, that any one of the class of persons enumerated who normally would be entitled to recover damages from the employer for the injury to themselves resulting from or because of the injury to or death of the employee must now obtain their remedy exclusively under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Admitting, *arguendo,* that the respondent was damaged by the injury to her husband, the damage to her was "on account of" such injury; she is within the class enumerated by Section 905 and, theerfore, her only remedy is that provided by the Act. To hold to the contrary is to "fly in the face of" the unmistakable meaning of Section 905 and the interpretations given thereto by many other courts in the country.

The United States Court of Appeals for the District of Columbia Circuit in its decision states that the Longshoremen's and Harbor Workers' Compensation Act makes no provision therein for compensating a spouse for loss of consortium (R. 12), inasmuch as no distinction is made as between the amount of compensation payable to married and unmarried male claimants (R. 24). If that omission is to be rectified, it should only be rectified by legislation enacted for that purpose and *not* by a judicial rewriting of the plain, exclusive liability provisions of Section 905 of the Act."

To carry the reasoning behind the decision in this cause one step further let us assume that the employee herein

was not merely injured but was killed in the scope of his employment. Unquestionably then, the widow would be entitled to benefits under the Act and the remedy provided therein would be exclusive. Could it possibly be argued that Congress intended that the Act should provide exclusive remedies in the case of death of an employe, but not in the case of injury to an employee? If the Legislature had not stated that the liability should be exclusive in the case of *either injury or death,* this argument might be sound, but when injuries were specifically included in the section how can it be maintained that different rights accrue dependent upon whether the employee is injured or whether he is killed?

CONCLUSION

It is obviously not possible to estimate accurately the extent of the effect of the decision of the United States Court of Appeals for the District of Columbia in this cause, should it be permitted to stand. Already there have been filed in the District of Columbia suits alleging loss of consortium on the part of the wife where matters had been closed on the basis of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and it is obvious that a flood of such claims and suits will now face employers subject to the provisions of the Act in the District of Columbia. In addition, there are employers subject to the Longshoremen's and Harbor Workers' Compensation Act in practically all other jurisdictions who will be faced with similar claims arising out of every compensable injury of any consequence to either spouse. It would follow logically that the same attack will no doubt be made on comparable "exclusiveness of liability" provisions of workmen's compensation laws in every state of the Union.

The question involved is of the utmost importance to the nation. The matter should be definitely settled by this Honorable Court in the exercise of its responsibility for the proper construction and application of Federal Statutes. Wherefore, Petitioner prays that a Writ of Certiorari may issue under the Seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

H. Mason Welch
J. Harry Welch
John R. Daily
J. Joseph Barse
Continental Building
Washington, D. C.
Attorneys for Petitioner

Steptoe & Johnson
1139 Shoreham Building
Washington, D. C.
Of Counsel